

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 26, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP742-CR

Cir. Ct. No. 2013CF172

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH G. HAYES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marinette County:
JAMES A. MORRISON, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Joseph Hayes appeals an order denying his motion for sentence modification. Hayes argues that a new factor—specifically, his ineligibility for a prison program—justifies a reduction of his sentence. We reject Hayes’s argument and affirm the order.

BACKGROUND

¶2 The State charged Hayes with homicide by intoxicated use of a vehicle; homicide while operating with a prohibited blood alcohol concentration; operating while intoxicated causing injury; and operating with a prohibited blood alcohol concentration causing injury. The complaint alleged that in September 2013, Hayes was driving the wrong direction on a divided highway when his vehicle collided head-on with that driven by K. R. A vehicle driven by E. T. was traveling behind that of K. R. and became “collected in the crash.” K. R. died in the crash and E. T., who had to be extracted from his vehicle, suffered injuries. A blood draw showed Hayes had a .23 blood alcohol concentration.

¶3 In exchange for Hayes’s no-contest pleas to homicide by intoxicated use of a vehicle, contrary to WIS. STAT. § 940.09(1)(a), and operating while intoxicated causing injury, contrary to WIS. STAT. § 346.63(2)(a)1, the State dismissed the other charges, along with civil citations for reckless driving and driving the wrong way on a divided highway. The State agreed to recommend a term of three to five years’ initial confinement followed by three to five years’ extended supervision on the homicide count, with a “consecutive straight sentence” on the other count. Out of a maximum possible twenty-six-year sentence, the circuit court imposed five years’ initial confinement and five years’ extended supervision on the homicide conviction, and one consecutive year in jail on the OWI causing injury conviction. Hayes’s postconviction motion for sentence modification was denied after a hearing. This appeal follows.

DISCUSSION

¶4 A circuit court may modify a defendant’s sentence upon a showing of a new factor. *See State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797

N.W.2d 828. The analysis involves a two-step process: (1) the defendant must demonstrate by clear and convincing evidence that a new factor exists; and (2) the defendant must show that the new factor justifies sentence modification. *Id.*, ¶¶36-37.

¶5 A new factor is “a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties.” *Id.*, ¶40. Whether a fact or set of facts constitutes a new factor is a question of law this court decides independently. *Id.*, ¶33. If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis. *Id.*, ¶38.

¶6 Here, Hayes claims his statutory ineligibility for the Substance Abuse Program (“SAP”)¹ constitutes a new factor warranting sentence modification. We are not persuaded. SAP allows prisoners to convert initial confinement time to extended supervision time if they successfully complete the program, thereby reducing their time in confinement without reducing their overall sentence. *See* WIS. STAT. § 302.05(3)(c). At the outset of the sentencing hearing, the circuit court questioned the presentence investigation report’s conclusion that Hayes was eligible for SAP. The court stated that it had checked the statute and believed the PSI was in error on this point.

¹ Effective August 3, 2011, the legislature amended the title of WIS. STAT. § 302.05 from Wisconsin Earned Release Program to Wisconsin Substance Abuse Program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶7 At the time Hayes was convicted and sentenced, WIS. STAT. § 302.05(3)(a)1. provided that inmates such as Hayes, incarcerated for committing a crime specified in WIS. STAT. ch. 940, were not eligible to participate in SAP. Regardless, both the State and defense counsel expressed their belief that Hayes was, indeed, eligible. The court stated:

And my understanding was that certainly under the old Earned Release Program 940 charges were not subject to Earned Release. It may ... change with the new statute, but at least both of you believe he is eligible, whether I make him eligible or whether the DOC determines if he's suitable are different issues.

¶8 The State and defense counsel then made their sentence recommendations, and Hayes exercised his right of allocution. Before imposing a sentence authorized by law, the circuit court considered the seriousness of the offenses; Hayes's character; the need to protect the public; and the mitigating factors Hayes raised. *See State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. In discussing the seriousness of the offenses, the court stated they were "very, very aggravated," describing the crash as "the predictable, natural, logical consequence of ... grossly irresponsible conduct." The court characterized K. R.'s death as "a Holocaust" for his family. The court also noted that E. T. "feels pain to this day" and suffered financial loss as a result of his injuries in the crash.

¶9 The circuit court acknowledged Hayes had no criminal history and recounted receiving approximately sixty letters in Hayes's support, noting that from the letters, he appeared to be a "thoughtful, giving, considerate, wonderful person" that goes out of his way to help people in the community, often anonymously. Given Hayes's admitted history of alcohol abuse, however, the circuit court stated: "You either had a guardian angel, or you've been very lucky

... I can't explain why you didn't have an OWI in the past with that kind of alcohol consumption." The court determined that Hayes's past alcohol consumption was relevant to the need to protect the community.

¶10 The circuit court determined probation would not be appropriate as it would "totally depreciate the seriousness" of the offenses. When imposing five years' initial confinement and five years' extended supervision on the homicide conviction, the court described this sentence as "incumbent," "fair," and "appropriate." The court indicated that the consecutive one-year sentence for OWI causing injury was likewise "appropriate," as E. T.'s life was "forever altered." The court then stated:

Now, having said that, and understanding the devastating reaction that that is to you, I am going to make you eligible for the Substance Abuse Programming. Counsel believes that you are, I had indicated that I thought you were not, but I will make you eligible for that which means you will be able to ... apply for that substance abuse program when you are within three years of your end date, so conceivably you can be out substantially less than the six years of time in prison that I'm imposing on you, and I'm ... changing this form right now to indicate that you are eligible for that program.

The court added: "I've indicated you are eligible, *if* you're statutorily eligible, you are eligible for the Substance Abuse Program." (Emphasis added.)

¶11 Citing *State v. Armstrong*, 2014 WI App 59, 354 Wis. 2d 111, 847 N.W.2d 860, Hayes contends his statutory ineligibility for SAP is a new factor highly relevant to the imposition of sentence because the circuit court deemed him eligible for SAP "and incorporat[ed] the program into its sentencing regime." *Armstrong*, however, is distinguishable on its facts. There, this court held that a miscalculation of the defendant's sentence credit constituted a new factor warranting sentence modification. *Id.*, ¶8. At the time of *Armstrong's* sentencing,

the parties and the court believed he was entitled to two years of sentence credit when he was really only entitled to eight months. *Id.* In concluding the amount of sentence credit was highly relevant to the circuit court’s imposition of sentence, the *Armstrong* court recounted:

Throughout the sentencing hearing, the circuit court pointedly and repeatedly drew attention to the amount of sentence credit to which Armstrong would be entitled, and made clear why the topic was important to the court. The court made statements that included the following: “We need to get [the sentence credit] figured out,” and “[H]ow does [sentence credit] calculate in.” The court noted that the sentence credit would be “considerable if it is approaching two years.” And finally, the court explained: “You know, you [Armstrong] have a lot of credit. The time that you are going to be serving in confinement is not going to be long.” The court’s repeated references to sentence credit were consistent with the court’s stated intent that Armstrong “serve some confinement time” that “is not going to be long” in order to give Armstrong a chance to “show that absolutely this is the last time that I [Armstrong] am going to be doing stuff like this.”

Id., ¶16.

¶12 Unlike the sentencing court in *Armstrong*, the circuit court in the present matter expressed its correct opinion—both before and after the imposition of sentence—that it did not believe Hayes was statutorily eligible for SAP. Taking the circuit court’s statements in context, the record supports the conclusion that the court marked Hayes “eligible” on the form despite indicating he may not be. Therefore, unlike the court in *Armstrong*, there is no unknowingly overlooked fact by the sentencing court. We are likewise unpersuaded by Hayes’s assertion that the circuit court crafted the sentence imposed with Hayes’s eligibility for SAP in mind. As the court clarified at the postconviction motion hearing: “I don’t think any fair reading of this transcript could ever indicate, and I’m telling you for the record, I never, ever intended to set a three year period of [initial confinement]. I

wanted to make him eligible, if he was. I didn't think he was." See *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (circuit court has additional opportunity to explain its sentence when challenged by postconviction motion). Based on the record, we conclude Hayes's statutory ineligibility for SAP does not constitute a new factor justifying sentence modification.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

